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UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	NO. CV 09-9235 MMM (AGRx)
)	
Plaintiff,)	
)	
v.)	PLAINTIFF'S OPPOSITION TO
)	MOTIONS TO STRIKE AND FOR
)	JUDGMENT ON THE PLEADINGS
206 FIREARMS and 41,725)	
rounds of assorted ammunition;)	DATE: September 13, 2010
)	TIME: 10:00 am
Defendants.)	CTRM: 780 (Roybal)
)	

STEVE MITCHELL, ET AL.,

Claimants

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I.

INTRODUCTION

Plaintiff United States of America (the "government") respectfully submits this memorandum of points and authorities in opposition to the motions of Claimant Stephen Mitchell ("Claimant") for judgment on the pleadings with regard to Counts I and II pursuant to Federal Rule of Civil Procedure 12(c)¹, and to strike portions of the Complaint pursuant to Rule 12(f).²

The material allegations of the government's Complaint, which must be accepted as true and construed in the light most favorable to the government for purposes of this motion, are that the defendant firearms and ammunition were involved in a pattern of illegal activity in which firearms and ammunition were offered for sale in knowing violation of federal law. The Complaint alleges that Claimant, the operator of a firearms retail store, knowingly made his inventory available for sale to persons whom he know or had reason to believe were prohibited from acquiring firearms and ammunition and, further, that Claimant and his employee actively assisted at least one prohibited person in concealing and disguising the true ownership of firearms and ammunition by permitting "straw purchasers" to complete the paperwork required when purchasing a firearm.

¹ A Rule 12(c) motion for judgment on the pleadings is governed by the same standards applicable to motions to dismiss under Rule 12(b)(6). *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989); *Frey v. Bank One*, 91 F.3d 45, 46 (7th Cir. 1996).

² Unless otherwise noted, all references herein to "Rule 12" refer to Rule 12 of the Federal Rules of Civil Procedure.

The facts alleged in the Complaint are more than adequate to refute Claimant's contention that the Complaint fails to allege sufficient facts to support a reasonable belief that the defendant firearms and ammunition are subject to forfeiture (the proper pleading standard in civil asset forfeiture actions). Moreover, Claimant has failed to identify any allegations of the Complaint that constitute "redundant, immaterial, impertinent, or scandalous matter" within the meaning of Rule 12(f). Accordingly, Claimant's motions for judgment on the pleadings and to strike portions of the Complaint should be denied in their entirety.

II.

STATEMENT OF FACTS³

Background

At the time of the seizure of the defendant firearms and ammunition, Claimant was a federally licensed firearms dealer (or federal firearm licensee - "FFL") with his business premises located at 15048 Bear Valley Road, Victorville, California.⁴

³ The facts are taken from the allegations of the Complaint. In ruling on a motion for judgment on the pleadings, the Court should accept as true all material allegations in the Complaint (as well as all reasonable inferences to be drawn therefrom) and construe them in the light most favorable to the plaintiff. *General Conference Corp. Of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996) (deciding Rule 12(b)(6) motion which applies identical standards). If a court determines that a Complaint is defective, the court should employ the same liberal standards in determining whether to permit a plaintiff to amend its Complaint in order to cure any defects raised by the motion. *Gallardo v. Board of County Commissioners*, 857 F. Supp. 783, 787 (D. Kan. 1994); see also *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F. 2d 1393, 1401 (9th Cir. 1986).

⁴ ATF denied Mitchell's subsequent application to renew his federal firearms license and he is no longer an FFL.

1 Mitchell conducted his firearms business under the name "Lock,
2 Stock & Barrel". Complaint at ¶7.

3 Because of their nature, firearms are subject to unique and
4 significant federal regulations. Among other things, FFLs are
5 required to record their acquisition and disposition of every
6 firearm in an acquisition and disposition ("A&D") record and to
7 maintain the A&D record at their licensed business premises. For
8 each firearm taken into inventory, the FFL is required to record
9 the make, model, and serial number of the firearm; the date of
10 acquisition; the name and address (or federal firearms license
11 number) of the person from whom the firearm was acquired; the
12 date on which the firearm was disposed of; and the name and
13 address (or federal firearms license number or Form 4473
14 transaction number) of the person to whom the dealer transferred
15 the firearm. Complaint at ¶10.

16 In addition to A&D records, an FFL is required to obtain a
17 completed ATF Form 4473 (also known as a "Firearms Transaction
18 Record") before the FFL can transfer or sell a firearm to any
19 unlicensed person. An FFL may not complete a transfer to an
20 unlicensed person without conducting a background check and
21 recording the information on the Form 4473. Complaint at ¶11.

22 The Gun Control Act, 18 U.S.C. §921 *et seq.* ("GCA"), makes
23 it unlawful for certain persons, including felons (*i.e.*, persons
24 convicted in any court of a crime punishable by imprisonment for
25 a term exceeding one year), unlawful drug users and illegal
26 aliens, to possess firearms. 18 U.S.C. § 922(g). It also makes
27 it unlawful for any person to sell or dispose of a firearm to
28 someone he knows or has reason to believe is under indictment for

1 or has been convicted of an offense punishable by imprisonment
2 for a term exceeding one year, or any other prohibited person.
3 18 U.S.C. § 922(d). The defendants here fall within the
4 definition of firearms and ammunition as set out in the GCA.
5 Complaint at ¶6.

6 Illegal Sales to Prohibited Persons by Claimant

7 In September 2007, the Bureau of Alcohol, Tobacco, Firearms
8 and Explosives ("ATF") received information from the California
9 Department of Justice ("CADOJ") that a recent CADOJ inspection of
10 Lock, Stock & Barrel (Claimant's business) revealed that the FFL
11 might be permitting straw purchases and/or selling firearms to
12 persons prohibited from possessing them. CADOJ also reported
13 that Lock, Stock & Barrel was destroying records required to be
14 maintained. ATF opened a criminal investigation into Lock, Stock
15 & Barrel. *Id.* at ¶13.

16 A straw purchase occurs when the actual buyer of the firearm
17 uses a third party (the straw purchaser) to execute the Form 4473
18 in order to create the false appearance that the straw purchaser
19 is the actual purchaser of the firearm when, in fact, he or she
20 is not. The FFL selling the firearm under these circumstances
21 violates federal law if the FFL is aware of the false statements
22 on the Form 4473 or has reason to believe he is disposing of the
23 firearm to a person prohibited from possessing such firearm under
24 federal law. *Id.* at ¶15.

25 From approximately November 2007 through December 2008, ATF
26 used undercover agents and confidential informants ("CIs") to
27 purchase firearms that could not lawfully be sold to the
28 purchasers because they (the purchasers) purported to be or were

1 in fact prohibited from receiving or possessing firearms under
2 federal law. *Id.* at ¶14. Lock, Stock & Barrel's storefront is a
3 small store. Within the store there is a sales counter that runs
4 along the eastern wall and then from east to west across the
5 store, where the cash register is situated. Behind that counter
6 is an approximately six foot cubicle type wall that separates the
7 office and storage area to the rear from the customer service
8 area. Sound travels well throughout the store. During all of
9 the undercover agent and CI purchases, Mitchell was either at the
10 front counter or behind the cubicle type wall. *Id.* at ¶18.

11 On at least one occasion, Mitchell personally allowed a
12 straw purchaser to complete the Form 4473 for a CI, who Mitchell
13 knew or had reason to believe was a convicted felon. During the
14 course of that transaction, Mitchell indicated that he knew the
15 convicted felon had obtained additional firearms from Lock, Stock
16 & Barrel, and further indicated a future willingness to sell the
17 CI additional firearms. *Id.* at ¶16.

18 Specifically, on September 10, 2008, Mitchell permitted CI-
19 1, who is a convicted felon and who had previously straw
20 purchased firearms from Lock, Stock & Barrel, to select a Hi-
21 Point Model C9 9mm pistol to purchase. During the conversation
22 with CI-1, Mitchell specifically noted that CI-1 had purchased
23 similar firearms, asking CI-1, "Don't you have one or two of
24 these?" CI-1 stated, "I've got to keep gettin' them," and
25 Mitchell replied, "You have to keep on gettin' them." CI-1
26 asked, "Don't you know I already got some?" and Mitchell stated,
27 "I know you got some." *Id.* at ¶19.
28

1 Mitchell then turned to CI-2 (the straw purchaser) and asked
2 her, "You got your stuff?" and CI-2 replied, "Yeah." Mitchell
3 asked, "You got the card and the license?" CI-2 stated, "Yeah,
4 yeah," and provided a California Driver's License and a
5 California State Handgun Safety Card. *Id.* at ¶20.

6 Mitchell asked CI-1, "That's all you want?" CI-1 stated,
7 "That's it." CI-1 paid Mitchell \$272.04 for the Hi-Point pistol.
8 CI-1 stated, "Reminds me of my other gun. Pretty soon I'll open
9 my own gun store with all the guns I bought from you." Mitchell
10 replied, "You got a lot of 'em." *Id.* at ¶21.

11 Mitchell completed a store invoice using CI-2's name and
12 information and retrieved a Form 4473, which he handed to CI-2.
13 CI-2 filled out the Form 4473. Mitchell reviewed the completed
14 Form 4473 and pointed out to CI-2 that she needed to fill in her
15 county and place of birth, stating, "Your residence is California
16 and put N/A there and N/A there." CI-1 stated, "You're giving us
17 a lot of help." Mitchell stated, "Have to. Have to, when you're
18 coming back." CI-1 stated, "Why do you think I'm back?" *Id.* at
19 ¶22.

20 In addition to the various straw purchases made on behalf of
21 CI-1, Mitchell had other reasons to suspect CI-1's prohibited
22 status. On or about July 16, 2008, Mitchell offered to repair a
23 firearm for CI-1 despite the CI's statement that he was afraid
24 the firearm might have "murder on it." *Id.* at ¶28.

25 False Statements on Theft/Loss Report

26 In addition to its other record-keeping requirements, the
27 GCA and its implementing regulations require FFLs to report any
28 theft or loss of a firearm to ATF by preparing and submitting an

ATF Form 3310.11 (Federal Firearms Licensee Theft/Loss Report).
 Complaint at ¶12. On July 6, 2008, the San Bernardino County
 Sheriff's Department responded to an alarm at Lock, Stock &
 Barrel. The business had been broken into and a number of
 firearms stolen. On or about August 15, 2008, Mitchell's FFL
 filed a Form 3310.11 (Federal Firearms Licensee Theft/Loss
 Report) with ATF. In that report, Mitchell listed a number of
 firearms as stolen that were, in fact, not stolen and were later
 recovered by ATF during the execution of search warrants.

III.

ARGUMENT

A. The Complaint States A Valid Claim

1. *The Allegations Of The Complaint Establish A Reasonable Belief That The Government Will Be Able to Satisfy Its Burden of Proof*

Claimant asserts that the Count I of the Complaint "fails to satisfy the particularity requirement of 18 U.S.C. 924(d)(2)(C)" because it fails "to allege how a single one of the 206 firearms and 41,725 rounds of ammunition sought to be forfeited were intended to be used in the alleged violations of 922(d)" or "how they were involved and/or used in a willful violation." Claimant's Memorandum at 4. In making this argument, Claimant applies an erroneous standard and ignores the allegations of the Complaint.

- a. The proper pleading standard is set out in Supplemental Rule G

Claimant argues that the complaint is flawed because it fails to satisfy what Claimant characterizes as a particularity of pleading requirement at 18 U.S.C. § 922(d)(2)(C). In fact,

1 even assuming that the cited provision contains an applicable
2 pleading requirement, it is clearly satisfied by the allegations
3 of and attachments to the Complaint because the only possible
4 pleading requirement that can be read into § 922(d)(2)(C) is that
5 the firearms and ammunition sought for forfeiture be
6 "particularly named and individually identified." The defendants
7 are identified in detail in Attachment A, and the allegations of
8 the Complaint specifically identify the violations alleged to
9 trigger the forfeiture sought.

10 Claimant's argument seems to be that the Complaint is
11 required not only to identify the defendants and the basis for
12 forfeiture, but to allege (1) facts sufficient to establish their
13 forfeiture by clear and convincing evidence and (2) that each of
14 the defendants was involved in an actual illegal transfer. These
15 arguments are not sustainable.

16 To begin with, the pleading requirements applicable to civil
17 forfeiture actions are established not by § 922, but by Rule G of
18 the Supplemental Rules for Admiralty or Maritime Claims and Asset
19 Forfeiture Actions ("Supplemental Rules"). Rule G (1) (entitled
20 "Scope") provides "[t]his rule governs a forfeiture action in rem
21 arising from a federal statute. *To the extent that this rule*
22 *does not address an issue*, Supplemental Rules C and E and the
23 Federal Rules of Civil Procedure also apply." (Emphasis added).
24 This limiting language makes clear that Rule G is the primary
25 and, to the extent it addresses an issue, *exclusive* authority in
26 civil in rem forfeiture actions. Among the issues specifically
27 addressed in Rule G are the pleading requirements for complaints
28

1 and the circumstances under which complaints may be dismissed or
2 otherwise disposed of at the pleading stage.

3 Pursuant to Rule G(8)(b), "[t]he sufficiency of the
4 complaint is governed by Rule G(2)," which provides that the
5 complaint must:

6 (a) be verified;

7 (b) state the grounds for subject-matter jurisdiction,
8 in rem jurisdiction over the defendant property, and
venue;

9 (c) describe the property with reasonable
particularity;

10 (d) if the property is tangible, state its location
11 when any seizure occurred and - if different - its
location when the action is filed;

12 (e) identify the statute under which the forfeiture is
13 action is brought; and

14 (f) state sufficiently detailed facts to support a
15 reasonable belief that the government will be able to
meet its burden of proof at trial.

16 These are the particularity standards by which a civil forfeiture
17 complaint are properly tested. To the extent that a statute is
18 inconsistent with those standards, the Rule trumps. See 28
19 U.S.C. § 2072 ("All laws in conflict with [the rules of practice
20 and procedure] shall be of no further force or effect after such
21 rules have taken effect."); *Griffith Co. V. N.L.R.B.*, 545 F.2d
22 1194, 1197 (9th Cir. 1976) ("[S]tatutes are superseded by
23 conflicting federal rules."). Thus, to the extent that § 922
24 (d)(2)(C) ever operated as a pleading requirement (and the
25 government contends that it did not), that requirement was
26 superseded by Rule G(2).

27 Rule G also specifically addresses the circumstances under
28 which a complaint may be dismissed (or, by implication, otherwise

1 disposed of at the pleading stage), as does 18 U.S.C. § 983
2 (enacted as part of the Civil Asset Forfeiture Reform Act of 2000
3 ("CAFRA")), which also governs civil forfeiture actions. Rule
4 G(8)(b)(ii) and § 983(a)(3)(D) provide that a civil forfeiture
5 complaint may not be dismissed "on the ground that the government
6 did not have adequate evidence at the time the complaint was
7 filed to establish the forfeitability of the property." These
8 provisions were enacted in reaction to pre-CAFRA dismissals at
9 the pleading stage of civil forfeiture cases by courts applying
10 Supplemental Rule E.⁵ *United States v. Lopez-Burgos*, 435 F.3d 1,
11 2-3 (1st Cir. 2006) (CAFRA raised the government's burden of
12 proof at trial but relaxed the pleading requirements).⁶

13 For these reasons, to the extent that Claimant argues that
14 the Complaint here fails to allege facts with sufficient
15 particularity, or which are not sufficient to establish
16 forfeitability of the defendants by clear and convincing
17 evidence, those arguments are foreclosed by these provisions,

18
19 ⁵ Specifically, Rule G(2) was intended to codify the Fourth
20 Circuit's decision in *United States v. Mondragon*, 313 F.3d 862
21 (4th Cir. 2002), in which it interpreted the "particularity
22 requirement" in Supplemental Rule E(2) which was supplanted by
23 Rule G(2)(f). Rule G, Advisory Committee Notes to subdivision
(2); *United States v. \$79,650*, 2009 WL 331294, at *3 (E.D. Va.
2009); *United States v. All Assets Held at Bank Julius Baer &*
Co., 571 F.Supp.2d 1, 16 (D.D.C. 2008)

24 ⁶ While CAFRA was a major reform bill, it was not, as some
25 have suggested, intended to diminish or debilitate the
26 government's civil forfeiture authority. CAFRA "was not designed
27 to emasculate federal civil forfeiture efforts," but to make
28 civil forfeiture "fairer . . . and an even stronger law
enforcement tool." H.R. Rep. 105-358(I), at 27 (1997). The
relaxation of the pleading requirement is an example of that
design.

1 which make it clear that the government's pleading burden is not
2 a difficult one, and that the government is not required to
3 satisfy its ultimate burden of proof based on the allegations of
4 the complaint. *United States v. Real Property Located at 5208*
5 *Los Franciscos Way*, 385 F.3d 1187, 1193 (9th Cir. 2004) ("The
6 government is not required to prove its case simply to get in the
7 courthouse door.")

8 Rather, the government need only allege facts sufficient to
9 "support a reasonable belief that the government will be able to
10 meet its burden of proof at trial." In the context of this
11 motion, the question is whether, taking all of the government's
12 allegations as true and drawing all reasonable inferences in the
13 government's favor, the facts support a reasonable belief that
14 the government can satisfy its burden. A fair reading of the
15 Complaint shows that it satisfies that standard. Should the
16 Court conclude that it does not, the government should be given
17 an opportunity to amend the complaint. *United States v. All*
18 *Funds . . . Held in the Name of Kobe Alexander*, 2007 WL 2687660,
19 at *14 (E.D.N.Y. 2007).

20 b. The allegations of the Complaint are sufficient to
21 state a claim

22 Here, the government has alleged that Lock, Stock & Barrel
23 made numerous sales of firearms and ammunition to a convicted
24 felon who was prohibited from possessing firearms under federal
25 law. These sales were made with Claimant in the relatively small
26 store within earshot of the transaction and, in some cases,
27 participating in the sale. On at least one occasion, Claimant
28 personally helped the straw purchaser complete the Form 4473 for

1 the sale of a firearm to the felon. During the course of this
2 transaction, the Claimant made several statements indicating that
3 he knew other firearms had been sold to the convicted felon and
4 indicated a willingness to sell the felon additional firearms in
5 the future.

6 When selling the firearm to the prohibited buyer in the
7 transaction described in the complaint, Mitchell is not alleged
8 to have placed any limitation or restriction on what type of
9 firearm could be purchased. Mitchell allowed CI-1 to select
10 whatever firearm he wanted, and later asked him if the selected
11 firearm was the only one CI-1 wanted to buy. In other words, the
12 reasonable inference to be drawn from the allegations of the
13 Complaint - to the extent that it is not obvious from the
14 totality of the allegations - is that Mitchell's entire inventory
15 was available to CI-1 (and other prohibited persons) for
16 purchase. Insofar as such purchases are explicitly forbidden
17 under the GCA, Mitchell's willingness to sell any firearm in his
18 inventory to a prohibited person, and his actual sale of a
19 firearm to such a person, means that all of the firearms in his
20 inventory were intended to be used by Mitchell in violation of 18
21 U.S.C. § 922(d) (sale to prohibited person).

22 The Complaint alleges sufficient facts to establish a
23 reasonable belief that the Government will be able to prove at
24 trial that all of the defendant firearms and ammunition were
25 intended to be used in a violation of 18 U.S.C. § 922(d). A
26 reasonable inference can be drawn from the allegations of the
27 Complaint that Claimant or his employee (with Claimant's
28 knowledge) regularly transferred firearms and ammunition to one

1 or more convicted felons in violation of § 922(d)(1). The felon
2 CI working with ATF was able to buy handguns, long guns, and
3 different calibers of ammunition, as well as multiple firearms at
4 one time. It is reasonable to infer that the felon working with
5 ATF was not alone in his success. In fact, there is a specific
6 allegation that CADOJ had provided information to ATF about other
7 suspected straw sales made by Lock, Stock & Barrel.⁷

8 2. *The Authorities Relied Upon By Claimant Are*
9 *Distinguishable*

10 The clear pattern of illegal sales here is more egregious
11 than the conduct in *United States v. Eighty-Six Firearms and*
12 *Twenty-Two Rounds of Ammunition*, 623 F.2d 643 (10th Cir. 1980).
13 There, ATF seized and sought to forfeit the firearms inventory of
14 a dealer who had unlawfully sold handguns to undercover agents on
15 two occasions. The district court permitted the forfeiture of
16 all of the handguns, but denied forfeiture of the long guns. *Id.*
17 The Court of Appeals held that all of the firearms should have
18 been forfeited (*id.* at 645), reasoning that although the agents
19 purchased only handguns, there was "little reason to doubt that
20 the long guns would willingly have been sold to the agents if
21 they had asked." *Id.*

23 ⁷ The entire purpose of having a straw purchaser fill out
24 the ATF Form 4473 is to mask the illegal sale. The penalties for
25 transferring a firearm to a felon without doing the required
26 paperwork are not significantly different than conducting a straw
27 purchase to the prohibited person. The primary benefit of using
28 straw purchasers is to make the illegal sales appear legitimate.
Because Lock, Stock & Barrel made its illicit sales using straw
buyers, it is virtually impossible to determine how many
prohibited persons acquired firearms from the FFL.

1 In reaching this conclusion, the court cited *United States*
2 *v. One Assortment of 12 Rifles and 21 Handguns*, 313 F.Supp. 641
3 (D.C. Fla. 1970), which also involved the seizure of the
4 inventory of a dealer engaged in illegal sales. In *12 Rifles*,
5 however, the dealer was unlicensed, and the court ordered the
6 forfeiture not only of the firearms sold illegally, but all
7 firearms displayed for sale, reasoning that the unlicensed dealer
8 would have sold all of the firearms if he had had the chance.
9 *Id.* 642. As a result, all of the firearms were "involved in or
10 intended to be used in" violation of 922(a)(1)(A). See also
11 *United States v. Approximately 627 Firearms More or Less*, 589 F.
12 Supp. 2d 1129 (S.D.Iowa 2008); *United States v. One Assortment of*
13 *89 Firearms*, 511 F. Supp. 133 (D.S.C. 1980). Here, as in *Eight-*
14 *Six Firearms* and *12 Rifles*, it appears clear that Claimant would
15 have sold any or all of the firearms and ammunition in his
16 inventory to the felon so long as there was an associate willing
17 to act as a straw purchaser.⁸

18
19 ⁸ As discussed in more detail below, nothing in the
20 Firearm Owners' Protection Act ("FOPA"), which amended the Gun
21 Control Act, including § 924(d), undermines the holding in
22 *Eighty-Six Firearms*, which Claimant contends is at odds with
23 *United States v. One Assortment of Seven Firearms*, 632 F.2d 1276
24 (5th Cir. 1980). He argues that FOPA addressed this purported
25 "split in the circuits." Memorandum at 5. However, none of the
26 legislative history cited by Claimant indicates the FOPA
27 amendments were aimed at this supposed split, and the two
28 opinions are not materially inconsistent.

25 In *Seven Firearms*, the court held that firearms subject to
26 forfeiture must be "reasonably identified to the violation, or in
27 this case, the sale. By holding identification is a necessary
28 indicator of intent, we give meaning to the words 'intended to be
used in ... any violation,' while ensuring that portions of a
firearm dealer's inventory that are unrelated to a given
violation are not swept away by enforcement officers." *Id.* at

1 Claimant also relies heavily on *United States v. 1,922*
2 *Assorted Firearms*, 330 F. Supp. 635 (E.D. Mo. 1971). However, as
3 the Court noted in *Eighty-Six Firearms*, reliance on *1,922*
4 *Assorted Firearms* is "futile." *Eighty-Six Firearms*, 623 F.2d at
5 644. The court in *1,922 Assorted Firearms* held that the
6 Government failed to meet its burden of proof in showing the
7 dealer had any intent to violate the federal firearms laws.
8 *1,922 Assorted Firearms*, 330 F. Supp. at 642; *Eight-Six Firearms*,
9 623 F.2d at 644. The illegal sales at issue in that case were
10 made by a clerk without the knowledge of the owner, which is not
11 the case here. Even the *1,922 Assorted Firearms* court noted that
12 with different facts, "a dealer's entire stock of goods may be
13 subject to forfeiture." *1,922 Assorted Firearms*, 330 F. Supp. at
14 641.

15 3. *The Legislative Amendments to § 924 Do Not Affect the*
16 *Analysis Here*

17 Claimant devotes an inordinate amount of attention to the
18 FOPA, attempting to link the passage of that legislation to *1,922*
19 *Assorted Firearms* in an attempt to cast FOPA as prohibiting the
20 government from seeking the forfeiture of an entire inventory.
21 In so doing, Claimant overstates the effect and intention of
22 FOPA. Nothing in the FOPA amendments to § 924(d) requires the
23 dismissal of this action. Claimants cite Senate Report 98-583 in
24 support of their contention that FOPA intended to "preclude"

25 1279. But the court stopped short of addressing what standards
26 should be applied to determine which firearms in an inventory
27 were intended to be used in any particular offense. It simply
28 found that the seven firearms at issue, which had been unlawfully
purchased but not delivered, could be forfeited to the
Government. That was the extent of the issue before it.

1 forfeiture of entire inventories, but there was no such intent.
 2 The government notes that, in interpreting a statute, a court
 3 should go no further than the plain language of the statute
 4 unless that language is ambiguous.⁹ There is no ambiguity here,
 5 and Claimant should not be allowed to suggest ambiguity through
 6 selective citation to legislative history. While FOPA narrowed
 7 the scope of forfeiture under the GCA -- excluding nearly all of
 8 the grounds relied upon by the government in *1,922 Assorted*
 9 *Firearms*, for example -- the amendments were not aimed at
 10 protecting rogue dealers like Claimant.¹⁰ FOPA represented a
 11 deliberate choice by Congress to permit the continued forfeiture
 12 of firearms in cases such as this one. Moreover, if Congress's
 13 intent in enacting the FOPA was as specific as Claimant suggests
 14 -- to prohibit the government from forfeiting entire inventories
 15 on the basis of exemplar transactions -- it certainly would have

16
 17 ⁹ Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447
 18 U.S. 102, 108 (1980) ("The starting point for interpreting a
 19 statute is the language of the statute itself. Absent a clear
 expressed legislative intention to the contrary, that language
 must ordinarily be regarded as conclusive."); United States v.
Johnson Controls, Inc., 457 F.3d 1009, 1014 (9th Cir. 2006).

20 ¹⁰ Far from intending to prohibit ATF from going after
 21 dealers like Mitchell, the legislative history of FOPA
 22 demonstrates that Congress wanted ATF to focus its enforcement
 23 efforts on the very types of activity alleged in the Complaint.
 For example, the Senate Report on a bill that was a predecessor
 24 of FOPA quoted from a Judiciary Subcommittee Report that
 concluded "Although Congress adopted the Gun Control Act with the
 primary object of limiting access of felons and other high-risk
 25 groups to firearms, the overbreadth of the law has led to the
 neglect of precisely this area of enforcement...[ATF's] own
 26 figures demonstrate that in recent years the percentage of its
 arrests devoted to felons in possession and persons knowingly
selling to them have dropped from 14 percent down to 10 percent
 27 of their firearms cases[.]" S. Rep. 97-476, 97th Cong., 2d Sess.,
 15 (June 8, 1982) (emphasis added).
 28

1 included specific language to carry that intent into effect. The
2 lack of any statutory language suggesting such intent is
3 dispositive of Claimant's argument.

4 Prior to FOPA, the Government could forfeit any firearm or
5 ammunition "intended to be used" in a violation of any provision
6 of the GCA, its regulations (including record-keeping violations)
7 or other criminal statute. FOPA restricted forfeiture to
8 situations where the firearm and/or ammunition was intended to be
9 used in connection with a smaller group of crimes, and raised the
10 standard of proof to clear and convincing evidence. For the
11 crimes that remained, which include § 922(d), the language
12 establishing forfeitability remained unchanged.

13 This choice was deliberate. A prior draft of the bill would
14 have amended the GCA to remove forfeiture authority for firearms
15 intended to be used in any crime. In a recognition of legitimate
16 law enforcement interests in seizing firearms intended to be used
17 in serious crimes the language was amended to permit the
18 government to continue to forfeit firearms intended to be used in
19 "clearly criminal and dangerous activities," including violations
20 of § 922(d). S.Rep. No. 98-583, 98th Cong., 2d Sess., 24-25
21 (August 8, 1984). Accordingly, any firearm or ammunition
22 "intended to be used" in a violation of § 922(d) was subject to
23 forfeiture both before and after FOPA.

24 Claimants correctly note that *United States v. Fifty-Two*
25 *Firearms*, 362 F. Supp.2d 1308 (M.D. Fla. 2005), applies the GCA
26 as amended by FOPA, but it is the facts and not the revised
27 statutory language that distinguish the instant case from *Fifty-*
28 *Two Firearms*. In *Fifty-Two Firearms* the government alleged that

1 an unlicensed dealer sold one shotgun to a felon. *Id.* at 1313-
2 14. Based on that single allegation, the Court was unable to
3 find that the unlicensed dealer intended to sell all of his
4 inventory to the felon. *Id.* The allegations here are far more
5 broad.

6 4. *Claimant's Construction of § 924(d) Would Render*
7 *Portions of the Statute Meaningless*

8 Finally, under Claimant's reading of 924(d), only firearms
9 actually transferred to prohibited persons could be forfeited by
10 the government despite the language that specifically permits the
11 forfeiture of firearms "intended to be used" in violations of
12 § 924(d). The effect of this reading would be to permit dealers
13 like Mitchell to maintain a well-stocked inventory and offer it
14 for sale to prohibited persons knowing that only the firearms
15 actually sold -- for which Mitchell has already been paid --
16 could be seized by the government. The rest of the inventory
17 could be maintained and sold to the next prohibited person who
18 walked in the door at no financial risk to the dealer. This
19 renders the forfeiture provision meaningless, which is to be
20 avoided. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (It is a
21 "'cardinal principle of statutory construction' that a statute
22 ought, upon the whole, to be so construed that, if it can be
23 prevented, no clause, sentence or word shall be superfluous, void
24 or insignificant.") (quoting *Duncan v. Walker*, 533 U.S. 167, 174
25 (2001)).

26 5. *The Allegations in Count One of the Complaint Are*
27 *Sufficient to Allege a Violation of 18 U.S.C. § 922(d)*

28 Claimant also argues that the government cannot establish
§ 922(d)(1) liability by asserting that the purchaser of the

1 firearms and ammunition was a "convicted felon." Claimants
2 accurately point out that the statutory prohibition does not
3 specifically refer to "felons," but rather to individuals who
4 have been "convicted in any court of a crime punishable by
5 imprisonment for a term exceeding one year." 18 U.S.C.
6 § 922(d)(1). It is common, however, to refer to this particular
7 prohibition as applying to convicted "felons." See, e.g.,
8 Holbrook, Stephen P., *Firearms Law Desk Book* § 2:10, p. 109
9 (Thomson/West 2006) (referring to the exact same prohibition found
10 in § 922(g)(1) as "the archetypical 'felon-in-possession'
11 prohibition").

12 Moreover, the Complaint does not limit its references to the
13 purchasers to "convicted felons." It also describes their
14 prohibited status under the firearms laws. See, Complaint at
15 ¶¶14 ("firearms that could not lawfully be sold to the purchasers
16 because they were prohibited from receiving or possessing
17 firearms under federal law") and 17 ("when CI-1 discussed his
18 felony conviction and his prohibited status"). In so doing, the
19 Complaint makes clear that the relevant purchaser is not just a
20 felon, but one who is prohibited from possessing firearms under
21 federal law. Thus, the Complaint here goes further than the one
22 found lacking in *United States v. Fifty-Two Firearms*, 362
23 F.Supp.2d 1308, 1314 (M.D. Fla. 2005), which alleged only that
24 the informant was a "convicted felon."

25 The complaint also alleges that on multiple occasions, Lock,
26 Stock & Barrel permitted the straw purchase of a firearm on
27 behalf of a convicted felon. See, e.g., Complaint at ¶¶ 16, 17,
28 19-22. The circumstances of the straw purchases outlined in the

1 complaint make it clear that the transactions were being done
2 with a straw purchaser because the real purchaser was prohibited
3 from receiving or possessing firearms. Should the court find
4 that this argument is well-taken, amendment will obviously cure
5 any defect.

6 **IV.**

7 **CONCLUSION**

8 For all of the reasons stated herein, Claimant's motion
9 should be denied in its entirety.

10 DATED: August 19, 2010

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